

# THE CASE OF S V ZUMA:

## Implications of allowing evidence of sexual history in rape trials

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Rape is one of the most underreported crimes worldwide, not least because of the trauma facing complainants once the case goes to trial. The case of *S v Zuma* was a clear illustration of this problem. The court's decision to allow Zuma's lawyers to cross-examine the complainant about her sexual history (governed by section 227 of the Criminal Procedure Act) has far-reaching implications. The court's failure to deal properly with section 227 has set a worrying precedent that is now binding on the lower courts where the majority of rape cases are heard. Moreover, the judgment does not reflect a consideration of the impact on the complainant's right to human dignity, privacy and equality. This means the court missed an opportunity to align section 227 with the constitutional dictates that now govern the administration of justice in South Africa.

On 4 May 2006, the Witwatersrand Local Division of the High Court in Johannesburg woke up to an atmosphere atypical of a court environment. On that day, police officers were present in large numbers, and scores of people were dancing, chanting and singing outside the court building. All eyes were on Judge van der Merwe who was about to read his judgment in the case of the State v Jacob Zuma.

A woman, whose name the judge decided not to disclose, had laid a charge of rape against Zuma – the deputy president of the ruling African National Congress (ANC) and former deputy president of the country. The charge was essentially that on 2 November 2005 Zuma raped the complainant in his home in Johannesburg. The accused was found not guilty.

This case will be recorded in history as one that attracted attention on a scale seldom witnessed in a

criminal case in the post-1994 dispensation. It sparked unprecedented interest among lawyers, politicians, governmental, non-governmental organisations and the general public, both nationally and internationally. Even the trial court accepted this fact in passing judgment. The judge declared that: "This trial created an unknown interest among the public at large and received enormous media coverage, printed as well as electronic."<sup>1</sup>

Moreover, the judge conceded to a live broadcast of the judgment, because despite the court's dislike of any form of publicity, it accepted that times have changed and that the coverage could be useful and educational.

One of the significant and controversial attributes of this extensive judgment was the interpretation of section 227 of the Criminal Procedure Act No. 51 of 1977. The accused's legal representatives made an application in terms of this section to get permission

to adduce evidence of the complainant's sexual history. The court was therefore given an opportunity to interpret the provisions of this section – an opportunity which, it is argued here, the court did not take.

The way in which the court dealt with this application is significant for two reasons:

- On the basis of the legal doctrine of precedence, lower courts are bound by decisions of the higher court. Whatever interpretation the judge attached to the provisions of this section would, therefore, be binding on the lower courts throughout the country. This is significant given that a vast majority (not less than 90%) of rape cases are dealt with in the lower courts, namely the regional courts.
- The applicability of the Constitution when interpreting the law is also relevant. As the supreme law against which all laws must be tested for their validity, the question is whether the presiding officer must wait until one of the parties challenges a particular legal provision as unconstitutional before s/he deals with it. This is particularly important because under the parliamentary sovereignty system that was in place before the Constitution was enacted, all that had to be considered before a ruling was made, was what was stated in law. The current situation is, however, very different.

This article deals with the two points raised above with specific focus on how the court dealt with the application in terms of section 227.

#### **Did the court deal correctly with Section 227 and its proviso?**

When the complainant finished her testimony, the defence made an application in terms of section 227. The essence of the application was that the court would give permission for the complainant to be cross-examined regarding her sexual history. Subsection 2 of the section reads as follows:

Evidence as to sexual intercourse by, or any sexual experience of any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such

sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence being tried.

The court granted this application – but it would appear that it did not properly deal with the provision. The reading of the judgment shows that attention was not paid to the proviso contained in the section, which reads as follows:

Provided that such evidence may be adduced and such female may be so questioned *in respect of the offence which is being tried* (emphasis added).

While the court relied on the general requirement of relevancy, the proviso that places a limitation on this requirement was not adequately dealt with. The proviso is aimed at regulating the approach the court should take in interpreting the main requirement. In essence, the proviso ensures that the court should not grant an application requiring evidence of the complainant's sexual history and her cross-examination based on such history unless the court is satisfied that such evidence is relevant.

The proviso therefore requires that such evidence and cross-examination, besides being relevant, be *in respect of the offence being tried*, and no other. It is not sufficient for the evidence to be relevant unless it is in respect of the offence being tried.

What is left unexplained in the judgment is what the proviso means or is supposed to mean. Such an explanation is crucial to the proper interpretation of the section. What will the regional courts, when faced with similar applications, do but follow the precedent set in this judgment, as though the proviso did not exist? Which shrewd defence lawyer appearing for an accused person on a rape charge will not invoke section 227(2) on the same grounds as *S v Zuma*, particularly in the regional courts that are bound by the precedent? And what are the likely implications of this situation?

### **The constitutional right to dignity, privacy and equality**

The second issue discussed in this article with regard to *S v Zuma* is much more vexed and relates to the constitutional approach to the interpretation of the law. This problem arises when one accepts, as one must do, that the application in terms of section 227(2) places a limitation on the complainant's right to human dignity, privacy and equality.

Just what is human dignity and how important is it? Dignity has been described as a proper sense of pride and self-respect, respectfulness or formality in a person's behaviour and bearing, the condition of being worthy of respect, esteem or honour, the respect or honour that a high rank or position is shown.<sup>2</sup> It is also described as the state of being worthy of honour or respect.<sup>3</sup>

The fact that dignity appears in so many articles of the Constitution and follows immediately after the right to equality in the Bill of Rights is not accidental or the result of verbosity. It illustrates how serious and fundamental human dignity is to the Constitution of this country. These constitutional values oblige the courts to make a radical departure from our past culture of dehumanising others, and instead to engender a culture of equality and respect for others.

The relevance of human dignity to this case was presented to the court at the very early stages of the trial. When setting out the basis of his defence, Zuma indicated that the complainant had made similar accusations against other men in the past. Nobody could miss the possibility of the encroachment onto the sexual history of the complainant and the consequences that it would bring to bear on her right to human dignity.

The court seems to have appreciated the potential infringement of the complainant's right to human dignity and her possible humiliation. This appears from, among others, the fact that the court read the following extract from *S v M<sup>4</sup>* into its judgment:

The difficulty is in determining when sexual experiences are relevant, either to the issues

or to the general creditworthiness of the victim. Controversy has arisen because (male) common law judges have allegedly been too willing to allow (female) victims' previous sexual character to be revealed, most often in cross-examination. In consequence, victims wanting to prosecute their assailants have had to be prepared to subject themselves to the ordeal, at both committal and trial of a long and searching cross-examination on their sexual experiences and attitudes. Needless to say, the potential humiliation and embarrassment of this ordeal, has discouraged victims from prosecuting their assailants. This controversy has led to legislative protection against gratuitous revelation of a victim's character.<sup>5</sup>

It has to be emphasised that the complainant's right to human dignity is not only inherent, but also non-derogable. 'Inherent' is defined as "...existing in something, especially as a permanent or characteristic attribute; vested in (a person, etc.) as a right or privilege."<sup>6</sup> To say a right is 'non-derogable' means that its protection cannot in anyway be lessened or deviated from. No legislation, including in this case section 227, can entitle the court to derogate from this right.

On the other hand, the accused's rights under the Constitution are not inherent, but are non-derogable. The court had made a point that the questioning and the leading of evidence of the complainant's sexual history was "fundamental to the accused's defence... relevant to the issue of consent, the question of motive and indeed credibility as well". This may well have been, but does it conclude the enquiry in view of the contestation that existed between the opposing rights of the complainant and the accused?

The fact that the court was seized with two conflicting rights, one inherent and the other not; one argued for or understood because of repetition, and the other not; did not receive the attention in the judgment it surely deserved.

It immediately becomes obvious that the application made to lead evidence and cross-

examine the complainant about her sexual history would necessarily limit her fundamental rights, and that the provisions of section 227(2) should have been pitted against section 36 of the Constitution for validity.

One would also have noticed that there were competing rights: those inherent rights of the complainant, and those of the accused, not inherent, but equally entrenched and non-derogable. No solution was sought to this contestation, and it has not been recorded as part of the judgment, despite the constitutional mandate for courts to deal with it.

### **A role for presiding officers**

It may well be that the infringement of the complainant's dignity, and other rights enshrined in the Constitution were not raised during the hearing of the section 227 application, as there is no reference to this in the judgment. However, the Constitution is the supreme law of the country and any law that is inconsistent with the Constitution is invalid.

This provision is binding on all organs of state and the judiciary and assures everyone equality before the law and equal protection by the law. It obliges the courts to respect, protect and promote the rights and values enshrined in the Bill of Rights and to interpret the Bill of Rights in a manner that seeks to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

The significance of this constitutional imperative is evident in that, upon taking office, judges are required to take a prescribed oath. Those judges appointed before the Constitution came into operation also take the new oath. Their oath is not different from that taken by judicial officers in the lower courts and states as follows:

I, [name of judge], swear/solemnly affirm that, as a judge of the High Court, will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

The content of this oath implies that constitutional issues that may arise during any trial by a court of law must be dealt with. It also implies that all law, common law or statutory, that needs to be interpreted must be tested against the Constitution, and particularly the Bill of Rights, for validity at all times. If this is not done and only the letter of the law is considered, grievous and irreversible harm may be done.

It therefore follows that all judicial officers must at all times have their 'constitutional hats' on. Judged against this interpretation of the constitutional imperative, therefore, the court in the Zuma case should have considered the constitutional justifiability of granting the section 227 application.

The case of *S v Fanuel Sitakeni Masiya*<sup>7</sup> illustrates this point well. In this case a 44 year-old man was charged with raping a nine year-old girl who was well known to him as a companion of her parents, with whom he normally drank. The evidence during the hearing in the regional court showed that the penetration by the male organ was through the girl's anus and not her vagina. The common law offence of rape can only take place through the vaginal orifice; penetration through any other orifice amounts to indecent assault, which is treated as a minor offence with a far lighter sentence than the prescribed sentence for rape.

Both the prosecutor and the defence in this case submitted that if the court accepted the evidence of the complainant, the accused should rightfully be convicted of indecent assault. Applying the law to the letter, these two lawyers were right, as the current definition of rape does not include non-consensual penetration *per anum*. However, the magistrate typified the common law definition of rape as 'unconstitutional' and in a well-reasoned judgment proceeded to convict the accused of rape. He found the common law definition of rape to be archaic and that it:

...discriminates arbitrarily against all (males and females, children and adults) with reference to which kind of sexual penetration is to be regarded as most serious; such discrimination is illogical,

unjust, irrational and unconstitutional and negates rights and values of human dignity, equality and freedom [in section 7(2) of the Constitution].<sup>8</sup>

The magistrate was of the view that he had an obligation not only to apply the Constitution to every matter he was faced with, but also to develop the common law in terms of section 8(3) of the Bill of Rights to "give effect to victims' and society's rights and interests and to limit the rights of accused".<sup>9</sup> The magistrate's decision was endorsed by RANCHOD, AJ, in the Transvaal Provincial Division of the High Court and referred to the Constitutional Court for confirmation.

#### **Consider the verdict**

Arguably, the verdict in the Zuma case was influenced by the decision of the court to grant the section 227 application. Some may even suggest that the outcome could have been different had it not been for the granting of this application. Either way, the decision has set a precedent that is now binding on the lower courts.

It is also concerning that the court missed an opportunity to align the provisions of section 227 with the constitutional dictates that govern the administration of justice in the current dispensation. It is untenable that the Constitution was not relied on when interpreting this section, and this raises serious constitutional questions, especially with regard to the non-derogable right to human dignity.

A decision such as this one, especially in the absence of a proper exploration of section 227 and its proviso, makes it difficult to counter the lay argument that 'accused persons seem to enjoy more rights than victims'. Given that rape is one of the most underreported crimes worldwide, it is difficult to see how reporting rates can be improved if there is a likelihood that the complainant's sexual history will be paraded in an open court. This is not to say that such evidence should not be included where justified. Rather, the point is to emphasise that when an application in terms of section 227 is granted, the reasons should be based on clear legal determinations with due regard to the constitutional imperatives binding on all judicial officers.

It is laudable that the judge had intended his judgment to be educational, but in the absence of a clear explanation of the interpretation of section 227 and its proviso, it can sadly not be said that this educational goal was achieved.

#### **Endnotes**

- 1 State v Zuma 2006 SA (WLD) at page 2.
- 2 Encarta World English Dictionary, <<http://encarta.msn.com/encnet/features/dictionary/dictionaryhome.aspx>>
- 3 The Concise Oxford Dictionary, 8th ed, Clarendon Press, Oxford, p 326.
- 4 S v M 2002 (2) SACR at 411.
- 5 Ibid.
- 6 The Concise Oxford Dictionary 8th ed, Clarendon Press, Oxford, p 608.
- 7 Regional Court Case no. SHG 94/04 Lydenburg and TPD Case no. CC628/2005.
- 8 Ibid.
- 9 Ibid.